

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of MARY L. TROY and U.S. POSTAL SERVICE,
POST OFFICE, Providence, R.I.

*Docket No. 96-1157; Submitted on the Record;
Issued July 13, 1998*

DECISION and ORDER

Before MICHAEL J. WALSH, GEORGE E. RIVERS,
A. PETER KANJORSKI

The issues are: (1) whether the Office of Workers' Compensation Programs properly found that there was an overpayment of compensation in the amount of \$4,653.72, as appellant received compensation at the augmented rate from October 13, 1985 through April 30, 1995 although she had no dependents for that period; and (2) whether appellant was at fault in the creation of the resulting \$4,653.72 overpayment of compensation.

In the present case, the Office accepted appellant's claim for a broken ankle and low back sprain resulting from a May 26, 1973 employment incident. The Office also subsequently accepted surgery for an L5 herniated nucleus pulposus and a recurrent disc surgery. The record indicates that appellant's case was placed on the periodic compensation rolls in 1973. Appellant completed annual Form CA-1032 affidavits of earnings and employment. The forms CA-1032 beginning with the November 5, 1984 letter, which contained, in pertinent part, the following advisement:

"The basic rate of compensation is 66 2/3 percent of the applicable pay rate if there are no eligible dependents. Compensation is payable at 75 percent of the applicable pay rate if there are one or more eligible dependents. You must therefore answer the questions below to ensure that your compensation is paid at the correct rate.

"You may claim additional compensation for a dependent if you have ... (b) an unmarried child ... who is living with you and is under 18 years of age; (c) an unmarried child who is 18 or over, but who is incapable of self-support by reason of mental or physical disability; (d) an unmarried child under 23 years of age who is a full-time student and has not completed four years of schooling beyond the high school level....

“You may also claim additional compensation for a dependent if you have a spouse or child who is not living with you to whom a Court has ordered you to pay support.”¹

Appellant submitted Forms CA-1032 and began receiving temporary total disability at 75 percent of her pay rate, which is appropriate for claimants with dependents. On April 10, 1980 the Office determined that appellant was no longer totally disabled for work due to her work-related injury and adjusted her pay rate for compensation purposes consistent with her wage-earning capacity. In a December 3, 1985 CA-1032 form, appellant indicated that her claim for dependency had ceased on October 13, 1985 as her last child turned 23 years old. In subsequent CA-1032 forms for the years 1986-1995, appellant answered “no” to the question of whether she was claiming additional compensation because she had a dependent. The record indicates that appellant continued receiving compensation at the augmented rate.

In a letter dated July 21, 1995, the Office issued a preliminary determination that appellant was at fault in the creation of an overpayment of compensation because she either was aware or should reasonably have been aware that her rate of compensation should have been reduced to the two thirds basic compensation rate when she stopped claiming dependents. The Office noted that appellant was being paid compensation based on the dependent rate of 75 percent of her salary for the period October 13, 1985 through April 30, 1995 and that no dependents were claimed since October 13, 1985. The Office found that appellant was at fault as she was aware or should reasonably have been aware that her rate of compensation should have been reduced to two-thirds when she stopped claiming dependents. The Office stated that appellant should have been aware that there should have been a resultant reduction in the amount of her compensation payments. The Office calculated an overpayment of compensation in the amount of \$4,653.72.

On August 16, 1995 appellant submitted an overpayment recovery questionnaire listing her monthly income as \$1355.00 and her monthly expenses as \$1335.00. Appellant indicated that her payments had decreased at the time she declared no dependents in 1985 and she thought that the Office had made the proper adjustments to her compensation. Appellant requested that the Office make a decision based on the written evidence on the issues of fault and possible waiver of overpayment.

By decision dated February 1, 1996, the Office found that an overpayment of compensation in the amount of \$4653.72 had occurred in appellant’s case as she accepted checks for augmented compensation for the period October 13, 1985 through April 30, 1995, although she had no legal dependents. The Office found appellant at fault in creating the overpayment of compensation as appellant had not submitted any evidence sufficient to establish that the preliminary finding of fault was in error. The Office stated that the record in the case file

¹ The CA-1032 form letter sent to appellant prior to 1984, while less detailed regarding the compensation rate, specifically indicated that if there were no claimed dependents, additional compensation on account of dependents “could no longer be claimed.” On December 15, 1983 and November 3, 1982, the Office sent appellant EN1615 form letters that requested detailed information on appellant’s dependents. These forms advised appellant of the circumstances under which compensation could be paid for dependents. Appellant completed these forms and returned them to the Office.

indicated that appellant's compensation payments decreased effective April 24, 1980 when she was determined to have a wage earning capacity. The Office noted that the decrease in payments occurred approximately five years prior to the time that appellant had no dependents in 1985. The Office requested that appellant forward a check in the amount of \$4,653.72 within 30 days from the date of the letter or to make other arrangements for repayment.

The Board finds that the Office properly found a \$4,653.72 overpayment of compensation was created for the period October 13, 1985 through April 30, 1995, based on appellant's acceptance of augmented compensation while having no eligible dependents.

The Board finds that the Office's calculations in the decisions dated February 1, 1996 and July 21, 1995 are correct as to the period and amount of overpayment. Appellant does not contest the amount of the overpayment and there is no evidence that the period or amount of overpayment were improperly determined.²

The Board finds that the Office properly determined that appellant was at fault in the creation of an overpayment of compensation from October 13, 1985 through April 30, 1995 as she knew or should have known that she was not entitled to receive augmented compensation during a period in which she had no legal dependents.

Section 8129(a) of the Federal Employees' Compensation Act provides that where an overpayment of compensation has been made "because of an error of fact or law," adjustment shall be made by decreasing later payments to which an individual is entitled. The only exception to this requirement is a situation which meets the tests set forth as follows in section 8129(b): "Adjustment or recovery by the United States may not be made when incorrect payment has been made to an individual who is without fault and when adjustment or recovery would defeat the purpose of the Act or would be against equity and good conscience."³ No waiver of an overpayment is possible if the claimant is not "without fault" in helping to create the overpayment.

In determining whether an individual is not "without fault" or, alternatively, "with fault," section 10.320 of Title 20 of the Code of Federal Regulations states in pertinent part:

"An individual is with fault in the creation of an overpayment who:

- (1) Made an incorrect statement as to a material fact which the individual knew or should have known to be incorrect; or
- (2) Failed to furnish information which the individual knew or should have known to be material; or

² See 5 U.S.C. §§ 8105, 8106 for the 66 2/3 rate and 5 U.S.C. § 8110(6) for the 75 percent rate for dependents.

³ 5 U.S.C. § 8129.

(3) With respect to the overpaid individual only, accepted a payment which the individual knew or should have been expected to know was incorrect.”⁴

In this case, the Office applied the third standard under section 10.320(b) of the Office’s regulations, as noted above⁵ in determining that appellant was at fault in creating the overpayment. In order for the Office to establish that appellant was with fault in creating the overpayment of compensation, the Office must establish that at the time appellant received the compensation checks in question, she knew or should have known that the payment was incorrect.⁶

The Board finds that the evidence of record establishes that appellant knew or should have known that she was not entitled to receive compensation at the augmented rate for a period in which she had no dependents.

Appellant received compensation for temporary total disability on the periodic rolls beginning in 1973. She was provided with annual Form CA-1032 affidavits, which advised her of the necessity to report whether or not she had eligible dependents necessary for claiming additional compensation. These forms indicated the additional compensation could not be claimed if there were no eligible dependents and, beginning November 5, 1984, set forth the Office’s method of calculating a claimant’s compensation rate: “The base rate of compensation is 66 2/3 percent of the applicable pay rate if the claimants have no eligible dependents. Compensation is payable at 75 percent of the applicable pay rate if one or more dependents are eligible for compensation.” Appellant completed and signed these forms and claimed additional compensation through 1984. Appellant notified the Office on December 3, 1985 that the dependency status ceased October 13, 1985 because her last child turned 23 years old and she did not claim additional compensation for dependents in this or subsequent CA-1032 forms. However, she made no attempt to contact the Office about returning checks for incorrect amounts or correcting the amounts of the continuing payments. Appellant’s actions demonstrate that appellant was aware of the Office’s formula in calculating a claimant’s compensation rate on the basis of eligible dependents and that not having legal dependents would lower the amount of her compensation checks as she had been advised by Forms CA-1032 on an annual basis since 1973.

Appellant indicates that she thought the Office had made the proper adjustment to her compensation at the time she declared no dependents in 1985 since her payments had decreased. This argument, however, is without merit. The record in this case shows that appellant’s compensation payments decreased effective April 24, 1980, when it was determined that appellant had a wage earning capacity. This decrease in payments occurred approximately 5 years prior to the time that appellant had no dependents in 1985. There is no indication in the record of any reduction of compensation contemporaneous with the 23rd birthday of appellant’s

⁴ 20 C.F.R. § 10.320(b).

⁵ 20 C.F.R. § 10.138(b)(3).

⁶ *Claude T. Green*, 42 ECAB 174, 279 (1990).

last eligible dependent. Further, appellant's statement that she thought the Office made a proper adjustment to compensation in 1985 shows that she knew that compensation was to be reduced to the basic rate once she no longer had an eligible dependent. The Board notes that even if an overpayment resulted from negligence by the Office, this does not excuse the employee from accepting payment which the employee knew or should have been expected to know he or she was not entitled.⁷

The Board thus finds that appellant knew or should have known that she was not entitled to receive augmented compensation for the period October 13, 1985 through April 30, 1995 as she had no eligible dependent during that period.⁸

The decision of the Office of Workers' Compensation Programs dated February 1, 1996 is affirmed.

Dated, Washington, D.C.
July 13, 1998

Michael J. Walsh
Chairman

George E. Rivers
Member

A. Peter Kanjorski
Alternate Member

⁷ *Russell E. Wageneck*, 46 ECAB 653 (1995).

⁸ Office regulations provide "Whenever an overpayment has been made to an individual who is entitled to further payments, proper adjustment shall be made by decreasing subsequent payments of compensation having due regard to the probable extent of future payments, the rate of compensation, the financial circumstances of the individual, and any other relevant factors, so as to minimize any resulting hardship upon such individual." 20 C.F.R. § 10.321(a). Recovery of the overpayment is not properly before the Board as the Office provided appellant with to choice to either pay off the overpayment in a lump sum or through installment payments. Thus, the Office has not issued a final decision regarding the method of recovery.